

**Remarks**

**Summary**

Claims 2-7, 10-13, 18-20, and 22-28 are presently pending. The Examiner rejected many of the previously pending claims as being unpatentable Ward 4,509,531 or Barney 4,312,358. All three new independent claims, claims 23, 25 and 26 contain features not disclosed in Barney or Ward and are patentable over these references alone or in combination.

**Neither Ward nor Barney Disclose or Render Obvious Claim 23 or 25**

The crux of the Examiner's reliance upon Ward and Barney as disclosing the previous set of claims centers around the Examiner's contention that both references teach a device capable of measuring the effectiveness and efficiency of a warming-up and winding-down physical activity (the "Function"). The Examiner has argued that since both devices can sense a change in skin temperature both devices are capable of performing this Function. The problem with this conclusion is that neither Barney nor Ward teaches a device with the necessary logical circuitry to perform this function. Simply strapping on a Barney or Ward monitor would not allow one to measure the effectiveness and efficiency of a warming-up and winding-down physical activity. Moreover, even if a user of the Barney or Ward monitor attempted to adjust the settings or functionality of these devices to perform this Function, he or she would not be successful, because the Barney or Ward device would have to be substantially modified to allow these devices to provide the claimed Function. Consequentially, the neither the Ward nor the Barney device is capable of performing the claimed Function, and therefore they do not anticipate the claims.

Ward and Barney also do not disclose a "temperature processing means" as claimed. According to Claims 23 and 25 the product must contain a "temperature processing means for determining when the individual has reached pre-established training conditions." Ward discloses a skin temperature monitor for diabetics, but the Ward monitor does not have any component which can determine when an individual has reached pre-established training conditions. Similarly, although the Barney device discloses a long list of features (measuring pulse rate, difference in body temperature, distance traveled, velocity, elapsed time, calories, etc. Col 4, lines 40-50), Barney does not disclose that his measuring instrument 11 can determine

when an individual has reached pre-established training conditions. Since neither Barney nor Ward discloses "a temperature processing means for determining when the individual has reached pre-established training conditions," Claims 23 and 25 are patentable over both Barney and Ward.

#### **Claim 24**

Claim 24 requires the "product of claim 23 wherein the temperature sensor continuously measures the individual's body temperature during the warming-up activity." The subject matter of Claim 24 previously appeared in Claim 9, and the Examiner rejected this claim under 35 U.S.C. 103(a) stating that continuously monitoring was an obvious matter of design choice. The Ward device is specifically designed to monitor the skin temperature at intervals (i.e. not continuously.) This feature is so integral to the functioning of the Ward device, that Ward states, even in the abstract that, "Measurements are enacted over brief intervals to conserve power." In other words, Ward clearly teaches away from the combination that the Examiner is proposing. "When the prior art teaches away from combining certain known elements, discovery of successful means of combining them is more likely to be nonobvious." KSR, 550 U.S. at \_\_\_, 82 USPQ2d at 1395. M.P.E.P. 2100-130. Ward clearly teaches away from continuous monitoring of the skin, and thus continuous monitoring of the skin cannot be obvious in view of Ward alone. Therefore Claim 24 is patentable over Ward, because Ward does not render obvious a "temperature sensor continuously measures the individual's body temperature during the warming-up activity."

#### **Claim 27**

Claim 27 recites "a method of using an activity apparatus while exercising, said method comprising the steps of: measuring an individual's body temperature before warming-up using the activity apparatus; using the activity apparatus to monitor the individual's body temperature while the individual warms-up; determining that the individual's body temperature has arisen in a range of 1.5-2.0<sup>0</sup> C; and informing the individual that he or she is now warmed-up by emitting a signal." Neither Ward nor Barney disclose any of these steps. For instance, neither Barney nor Ward inform the individual that he or she is now warmed-up by emitting a signal. While it is true that the Ward device, for example, can emit a tone when the skin temperature changes by a

U.S. Application No. 10/586,519  
Amendment dated November 14, 2008  
Reply to Office Action dated May 14, 2008

certain threshold value, the Ward device does not perform the step of *informing* the individual that he or she is now *warmed-up* by emitting a signal. The Ward device cannot link its alarm to emit when the individual is warmed-up, because such logical circuitry was not built into the Ward device, and therefore Ward does anticipate Claim 27.

Similarly, the Barney device does not informing the individual that he or she is now warmed-up by emitting a signal. While, Barney does disclose using a pair of alphanumeric display to provide the wearer with information, these displays do not inform the individual that he or she is now warmed-up by emitting a signal. Therefore Barney does not disclose Claim 27.

### **Technical Objections and 35 USC 112**

The Examiner's objects and rejections under 35 U.S.C. are moot in view of the new and amended claims.

### **Conclusion**

In view of the foregoing, the Applicants respectfully request that the Examiner consider the claims as amended for examination on the merits. A timely allowance of the pending claims is requested. If there are any fees (such as necessary extension of time or extra claims fees) due in connection with the filing of this Response and Amendment which are not covered by the concurrently submitted transmittal document, please charge any necessary fees or credit any overpayments to Deposit Account No. 50-1349. The Examiner is invited to contact Applicants' undersigned attorneys and agents by telephone to discuss any matters if the Examiner feels such discussions may expedite the progress of the present application toward allowance.

Respectfully submitted,

Dated: November 14, 2008

By: /Paul Roberts/

**HOGAN & HARTSON LLP**  
555 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20004

Paul Roberts  
Registration No. 56,990

U.S. Application No. 10/586,519  
Amendment dated November 14, 2008  
Reply to Office Action dated May 14, 2008

Telephone: 267-675-4628  
Facsimile: 267-675-4601  
Customer No. 24633